

NTSB Order No. EA-5085

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 18th day of March, 2004

Respondent.

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on January 28, 2003, following an evidentiary hearing.<sup>1</sup> The law judge partially affirmed the Administrator's order. The law judge found, as alleged, that respondent had violated SFAR<sup>2</sup> 71, section

<sup>2</sup> Special Federal Aviation Regulation.

6, by flying lower than the minimum 1500 feet AGL,<sup>3</sup> and SFAR 71, section 7, by failing to brief the passengers not to attempt to exit the helicopter until the blades had stopped rotating. The law judge dismissed the other charge (SFAR section 3) of failing to wear a flotation device ("PFD").<sup>4</sup> We deny respondent's appeal except to the extent that we have decided that sanction should be waived in connection with the briefing charge.

Respondent owns and is the chief pilot of a helicopter air tour operation on Maui. The Administrator's complaint was brought as a result of an undercover operation during which an FAA inspector (Mr. Frank Vavra) posed as a tourist on one of respondent's sightseeing flights.

Respondent, the FAA inspector-employee, and an unrelated tourist were the occupants of the helicopter on the flight in question. The FAA inspector testified that the pilot was not wearing a flotation device, that he did not provide a complete water briefing, and that respondent flew at approximately 300 feet AGL when transitioning from Kahakuloa to the Honokohau valley.<sup>5</sup>

---

<sup>3</sup> Above Ground Level.

<sup>4</sup> The law judge also affirmed the residual section 91.13(a) charge, prohibiting careless or reckless operations.

<sup>5</sup> It is important to note that, while the testimony elicited by the Administrator extended to a number of instances where respondent allegedly flew below the required 1500 feet AGL, the instances beyond the one identified in the complaint and recited here may not be used as independent violations or used to increase any penalty because respondent was given no notice of them in the complaint. They may be used only to support the witness' testimony.

Unknown to the FAA, the record establishes beyond any doubt that respondent and other investigation targets were well aware of these FAA operations and the undercover operatives. Due to the undercover FAA presence, respondent chose to fly this trip in place of the scheduled pilot. Respondent testified that at no time in the flight did he operate the aircraft below 1500 feet AGL and that it would have been incredible for him to do so knowing there was an FAA inspector onboard. The tourist returned to Maui at respondent's request to testify but her testimony added no useful information in this regard.<sup>6</sup>

The law judge dismissed the PFD charge. The law judge accepted respondent's explanation that he was wearing one, but that the way he was wearing it, and the seatbelt over it, would have made it difficult or impossible to see.

As to the completeness of the water ditching briefing, the law judge found, referring to the helicopter's operating handbook, that respondent should have advised passengers to be sure not to exit the aircraft until after the blades had stopped rotating. The law judge acknowledged the conflicting testimony on the altitude of flight, recognized that the Administrator's witness had little experience in altitude recognition on Hawaiian topography, but found nevertheless for the Administrator, noting that even a low-time pilot should be able to recognize the

---

<sup>6</sup> The tourist had taken a video of much of the trip. The video allegedly showed that respondent was not wearing a PFD but the video was not introduced in evidence.

difference between 1500 and 300 feet. Tr. at 303.

We affirm the section 7 briefing charge, but find that in this case it should result in no sanction due to the apparent lack of notice to pilots of what the Administrator expects in this briefing. Section 7 states:

Before takeoff, each PIC<sup>7</sup> of an air tour flight of Hawaii with a flight segment beyond the ocean shore of any island shall ensure that each passenger has been briefed on the following...:

- (a) Water ditching procedures;
- (b) Use of required flotation equipment; and
- (c) Emergency egress from the aircraft in event of a water landing.

The rule does not specify what water ditching procedures are to be covered in the briefing. The Administrator offers no written guidance to instruct those subject to SFAR 71 as to precisely what the briefing should contain or that it should contain the discussion her counsel argues here.

Both respondent and the employee who drove the passengers from the office to the ramp area briefed the passengers for at least 15-20 minutes. Tr. at 97 (Ms. Bergman's briefing lasted approximately that long; respondent gave another briefing in the helicopter). Testimony indicated that the briefing covered (at least) the rotors, the life vest, headsets, the doors (emergency exits),<sup>8</sup> and the altitude they would be flying (noting that

---

<sup>7</sup> Pilot in command.

<sup>8</sup> The Administrator's witness testified that there was no emergency exit briefing, but this allegation was not part of the (continued...)

regulations required all to fly approximately the same altitude and course). If the Administrator expects a particular issue to be covered in the briefing, she must identify that issue; she may not create and impose briefing requirements after the fact.

If the Administrator seeks to develop the law through adjudication rather than through rulemaking and create a requirement through this enforcement action that the water ditching briefing should always include discussion of the dangers of exiting the aircraft if the rotors are still turning, she is authorized to do so. See Administrator v. Miller, NTSB Order No. EA-3581 (1992), citing Martin v. OSHRC, 499 U.S. 144, 111 S. Ct. 1171, 1176 (1991) (rulemaking through adjudication is permissible if the interpretation is a reasonable one, and not inconsistent with prior statements). We have reviewed the facts here in light of Miller, and conclude that the Administrator may adopt the argued interpretation here. However, and also consistent with Miller, respondent may not properly be sanctioned for this violation, having had no notice of the Administrator's interpretation, and the sanction will be waived.

The last alleged violation - the low flight claim - is equally difficult, but for other reasons. On the one hand, it is well established that credibility determinations by the law judge

---

(continued...)

complaint and was inconsistent with the testimony of Mauiscape personnel as well as the other passenger, Ms. Churchill. It is not relevant here except as to the credibility and reliability of Mr. Vavra's testimony.

are not to be overturned unless made in an arbitrary or capricious manner. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there. On the other hand, respondent's argument that he would not deviate so clearly from minimum required altitude when he knew an undercover FAA inspector was in the seat next to him must be taken into account.

The law judge logically and thoroughly considered the evidence. The law judge clearly considered at least some of respondent's testimony reliable, when he concluded that respondent had been wearing his PFD. We can find no clear error in a conclusion that, at a transition point in the flight (coming up over a ridge and down into another valley), respondent failed to maintain proper height over the ridge. Accepting the investigator's testimony on the grounds that even he could tell the difference between 300 and 1500 feet is not arbitrary or capricious. The law judge's finding that respondent flew 1200 feet too low is ultimately a credibility determination in favor of Mr. Vavra that we decline to overturn. We cannot find that this is such clear error or so inherently incredible that we should substitute our judgment for that of the law judge, who had the opportunity to observe the witnesses' demeanor. See also Administrator v. Klock, 6 NTSB 1531 (1989) (law judge's credibility choices "are not vulnerable to reversal on appeal simply because respondent believes that more probable explanations...were put forth....").

Finally, respondent argues that the § 91.13(a) charge has

not been established. That was pleaded as a residual claim, accompanying any operational violation. Administrator v. Pritchett, NTSB Order No. EA-3271 (1991) at n.17, and cases cited there (a violation of an operational FAR regulation is sufficient to support a finding of a "residual" or "derivative" section 91.9 (now 91.13) violation). As the law judge noted, it has no effect on sanction.

The Administrator's order proposed a suspension of 120 days. The law judge reduced the suspension to 45 days. Having dismissed the PFD charge, he apportioned the sanction 30 days to the altitude violation and 15 days to the briefing violation. The Administrator did not appeal the reduction or the law judge's analysis of how the sanction should be apportioned to the violations. Accordingly, consistent with our sanction waiver on the briefing charge, respondent's suspension will last 30 days.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied except to the extent we find that the SFAR section 7 suspension is waived; and
2. The 30-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>9</sup>

ENGLEMAN CONNORS, Chairman, ROSENKER, Vice Chairman, and GOGLIA, CARMODY, and HEALING, Members of the Board, concurred in the above opinion and order.

---

<sup>9</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(g).